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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 211

TIMOTHY F. COSTELLO AND KATHERINE A. COSTELLO, ETC.,

Petitioners,

vs.

TIMOTHY J. COSTELLO, JAMES A. COSTELLO, AND ELLA A. COSTELLO, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

FRED J. RICE,
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Counsel for Petitioners.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF

A

Summary Statement of Matter Involved

Katherine Connor, a resident of the District of Columbia, executed her last will and testament on June 6, 1936. This will was drawn by the late Alexander H. Bell, formerly one of Washington's most able attorneys and a former President of the District Bar Association. Katherine Connor died October 12, 1941, seized of certain parcels of real estate and personal property. With regard to the real estate involved in this action, her will provided:

> Item 2—"I give and devise to my brother Jeremiah Costello, for and during the term of his natural life, the

following described real estate, the premises locally designated as Nos. 14 and 16 H Street, N. E. howsoever the same be described by metes and bounds or numbers; also lot 21 in Square 676 assessed to me by the name of "Catherine" Connor, being an unimproved lot and also lots locally designated as Nos. 100 and 102 I Street, N. W. in said city and district, being lots 22 and 23 in Square West of Square 623." (R. 1)

Item 5—"After the death of my brother Jeremiah Costello, I give and devise the real estate devised to him, for life, in the second item hereof, to such persons as may at the time of the death of my said brother be my heirs at law, in fee simple and absolutely." (R. 2)

Her will also contained the following provision with regard to other real estate in which she had a remainder interest, not involved in this action:

Item 4—"I give and devise the estate in remainder which I have, after the death of my nephew, Timothy F. Costello, in the premises No. 1722 North Capitol Street, in the city and district, to such persons as may at the death of my said nephew be my heirs at law, in fee simple and absolutely."

At the time of making her will, June 6, 1936, Katherine Connor had living a brother, Jeremiah Costello, mentioned in said Item 2 and 5 of her will and ten nephews and nieces as follows: Timothy J. Costello, James R. Costello, Ella A. Costello, and Robert F. Costello, children of Robert F. Costello, deceased brother of the testatrix; Leon A. (Timothy L.) Costello, Helen Saied, Mary Birch, and Elizabeth Nolan, children of Timothy C. Costello, deceased brother of the testatrix; Timothy F. Costello, son of Thomas A. Costello, a deceased brother of the testatrix; and Timothy A. Costello, son of Jeremiah Costello, the surviving brother of the testatrix.

At her death she was survived by her brother, Jeremiah, and the said ten nephews and nieces. Her brother, Jeremiah Costello, died on November 8, 1942, and said ten nephews and nieces survived him.

After Jeremiah Costello's death, Timothy J. Costello, James R. Costello, and Ella A. Costello, and Robert F. Costello brought a Complaint for Partition and Receiver in the District Court of the United States (R. 3) for the District of Columbia, naming as defendants therein Timothy F. Costello, Petitioner herein, Leo A. Costello, Timothy A. Costello, assignor to Katherine A. Costello, Petitioner herein (who was substituted in the action in the said District Court in his place and stead), Helen Saied, Mary Birch and Elizabeth Nolan, parties defendants in this petition.

It was the contention of the Plaintiffs and of the defendants named in the complaint except Timothy F. Costello, Petitioner herein, Timothy A. Costello, (whose share is payable to this assignee, Katherine A. Costello, who was substituted as a party defendant in his place and stead) and Katherine A. Costello, Petitioner herein, that upon the death of said Jeremiah Costello on November 8, 1942, the fee simple title to the real estate devised in Item 5 of the will vested in the ten nephews and nieces in equal shares. It was and is the contention of the defendants, Timothy F. Costello, named in said complaint, Timothy A. Costello, whose share is payable to his assignee, Katherine A. Costello (who was substituted as a party defendant in his place and stead) and Katherine A. Costello, named in said complaint, that the remainder in fee simple after the life estate in Jeremiah Costello, devised in Item 5 of the will vested upon the death of the testatrix in her brother, Jeremiah Costello, and in the children of her deceased brothers "per stirpes or by stocks" as provided

by Section 105 of Title 18 of the Laws of the District of Columbia.

By agreement and stipulation of the parties to the complaint, receivers were appointed, the real estate was sold and the proceeds thereof held to await the outcome of the action.

Following the filing of answers to the complaint, the matter came before the Court upon a Motion for Summary Judgment. There was no dispute as to the facts. The Court allowed the Motion for Summary Judgment (R. 17) and ordered "that the net proceeds of sale of the real estate herein involved are distributable equally among the plaintiffs and defendants" naming them.

Appeal was then taken by Timothy F. Costello and Katherine A. Costello, assignee of Timothy A. Costello, defendants, appellants in the Court of Appeals and Petitioners herein, to the United States Court of Appeals for the District of Columbia, from the Summary Judgment entered in the action. The United States Court of Appeals for the District of Columbia affirmed the judgment of the District Court of the United States for the District of Columbia. (R. 26)

The Petitioners herein were defendants in the action in the District Court and appellants in the Circuit Court of Appeals. All other parties to the complaint in the District Court, with the exception of Timothy A. Costello, defendant, whose share is payable to Katherine A. Costello, who was substituted as a party defendant in his place and stead, were appellees before the Circuit Court of Appeals and are named as respondents herein.

B

Basis of Jurisdiction

1. Petitioners bring this petition pursuant to the provisions of U. S. C. A., Ti. 28, Section 347.

2. Petitioners contend that by the decisions of the United States Court of Appeals for the District of Columbia, they have been deprived of their rightful shares of the remainder in fee simple conveyed under Item 5 of the will which the testatrix intended them to have and which by law they are entitled to receive.

Barker v. *Monks,* 315 Mass. 626;
Williams et al. Trustee v. *Taylor,* 276 Mass. Rep. 357;
Thompson et al. Trustees v. *Clarke et al.,* 264 Mass. Rep. 56;
Blume v. *Kimball,* 222 Mass. Rep. 412;
Marsh v. *Hoyt,* 161 Mass. 461;
Dove v. *Torr,* 128 Mass. 39;
Abbott v. *Bradstreet, et al.,* 3 Allen (Mass.) Rep. 589;
Himmel v. *Himmel,* 294 Illinois Rep. 557;
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Lee v. *Waltjen,* 141 Md. Rep. 460;
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Larmour v. *Rich et al.*, 71 Md. Rep. 374;
Linton v. *Laycock et al.*, 3 Ohio State Rep. 134;
68 Cal. App. 420;
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Kenyon Petitioner, 17 R. I. 149;
Bullock v. *Downes*, 9 H. L. Cas.;
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Johnson v. *Washington Loan & Trust Company*, 33 App. D. C. 242-259;
McArthur et al. v. *Scott et al.*, 113 U. S. Rep. 380.

3. Petitioners contend the decision of the United States Court of Appeals for the District of Columbia is contrary to and does violence to the decisions of Appellate Courts of competent jurisdictions.

See Cases cited B 2—*supra.*

4. Petitioners contend that the determination of the issue involved herein is of great moment because of the effect of the decision of the United States Court of Appeals for the District of Columbia on titles to real estate in which devises in wills using the same or similar wording have been deemed to have vested title at the time of the death of the testator.

C

Questions Presented

Katherine Connor's will was drawn to express her intentions as to disposition of her property by Alexander H. Bell, an able and experienced lawyer, a man who must be presumed to be well-versed in the statutes and case law regulating the conveyance of real estate by will in the District of Columbia.

Item 4 of the will, an item not in issue in this proceeding except as to its inferential effect, states: (R. 1 and 2)

> "I give and devise the estate in remainder which I have, after the death of my nephew, Timothy F. Costello, in the premises * * * to such persons as may at the death of my said nephew be my heirs at law, in fee simple and absolutely."

Item 5 of the will, the item in issue to be construed, states:

> "After the death of my brother Jeremiah Costello, I give and devise the real estate devised to him, for life, in the second item hereof, to such persons as may at the time of the death of my said brother be my heirs at law, in fee simple and absolutely."

Each item provides that after the death of the life tenant the remainder in fee simple and absolutely is devised to "such persons as may at the time of the death of the life tenant be my heirs at law."

All pertinent cases in the Courts of competent jurisdiction are to the effect that the wording used in Items 4 and 5 of the will indicates an intent that the real estate devised is to vest upon the death of the testatrix.

D

Reasons Relied On For the Allowance of the Writ

In its decision the United States Court of Appeals for the District of Columbia has deliberately ignored the applicable decisions of this and other Courts of competent jurisdiction. It recognized "the general rule of construction to be that a devise to 'heirs at law' of a testator will ordinarily be construed as referring to those who are such at the time of the testator's death, since the law favors the early vesting of estates," and that the rule applies unless "a *different* intention is *clearly manifested* in the

will" (emphasis added). This leaves as the issue for determination by this Court—is such a manifest intention shown in this will?

The Court erroneously ruled "that this language (Item 5) was intended by her (testatrix), and must be taken, as meaning testatrix's heirs at law determined at the death of the life tenant." Such a ruling is contrary to all case law applicable to this and United States Court of Appeals.

In the following cases the Court held that the property vested at the death of the testator.

Barker v. *Monks*, 315 Mass. 626, after setting up a life estate, the testator directed that: "Until the decease of all my children. I then order and direct that my Trustee for time being shall make over and convey all my estate equally to my grandchildren." "The word 'then' (and similar expressions) when used in present connection is held to mean when estate was to be distributed and not used by way of description of persons who were to take." The opinion in this case was rendered March 3, 1944. It is the most recent one and in reaching the conclusion that the property vested at the death of the testator, the Court made an exhaustive study of the points involved—which were similar to the points involved in this case—and in doing so reviewed the entire law upon the subject.

Marsh v. *Hoyt*, 161 Mass. 461, after setting up a life estate, the testator directed that: "To my niece, Anna A. Nye, for life, and, to take effect at her decease, said one-third part to her children in equal shares, to them, their heirs forever."

Brown v. *Brown*, 253 Illinois 466, after setting up a life estate, the testator directed that: "Upon death of my wife, then it is my will that my estate then remaining be divided between my lawful heirs."

Kenyon, Petitioner, 17 R. I. 149, after setting up a life estate, the testator directed that: "After the decease of D. C. Kenyon, I give and bequeath, all the property affected by the above trust (life estate) which

shall then remain, to my own right heirs." The Court quoted Cusack v. Rood, 24 W. R. 391, in which testator left a life estate and then stated: "After their death to pay, distribute and divide the same between and among the persons who, under the statute for distribution of intestate estates, would then be entitled thereto."

Mortimer v. *Mortimer*, 4 App. Cas. 448, affirmed 7 Ch. Div. 332, after setting up a life estate, the testator directed that: "*After death* of my child *to such persons as will then* be entitled to receive as my next of kin." (emphasis added)

Bullock v. *Downes*, 9 H. L. Cas., after setting up a life estate the testator directed that: "After death of child without issue to such persons of blood of me as would by virtue of Statute of Distribution have become and had been then entitled thereto," the Court said that "then" refers to possession.

The decisions of the Courts cited above are unquestioned authority for the proposition that the wording of Item 5 of the will instead of manifesting a different intention clearly manifested the intention of the testatrix that the remainder interest devised therein is to vest upon her death. In each decision words identical with or similar to the words used by Mr. Bell express the testatrix's intention are ruled by the Court to express the intention that the remainder devised was to vest on the death of the testatrix.

By the use of the words heirs at law, Mr. Bell embodied into the will the provisions of the Statutes of the District of Columbia regulating intestate succession. Section 103, Title 18 of the Code of Laws of the District of Columbia provides:

> "No right in the inheritance shall accrue to or vest in any person other than the children of the intestate and their descendants, unless such person is in being and capable in law to take as heir *at the time of the intestate's death;* * * *." (Emphasis added.)

This indicates the intent of the testatrix that only her brother, her nephews and her nieces, who were in being and entitled to take at her death were meant by the use of the words heirs at law in her will.

In making its decision the United States Court of Appeals for the District of Columbia erroneously failed to consider the authorities listed above as well as the effect of the provision of the statute also cited.

The Court in its reasoning points out "there is nothing to indicate any preference for some of the nieces and nephews over the others." The contrary is true. In the will the testatrix did indicate an intention to prefer her brother, Jeremiah Costello, mentioned in Items 2, 3, 5, 6, and 7, and her nephew, Timothy F. Costello, mentioned in Item 1 of the will. (R. 1 and 2)

The only two persons for whom she did show a preference in her will are the same two persons who, by the ruling of the Court of Appeals, are deprived of their preferential rights in this property. Her brother, Jeremiah Costello, and her nephew, Timothy F. Costello, are the only persons mentioned by name in her will. (R. 1 and 2)

> *Knight* v. *Pottgieser*, 176 Illinois 368, stated as follows: "Remainder to a class not by name described, vests at the death of the testator, with enjoyment later."

The reasoning expressed in the last paragraph of the Court's decision indicates an attempt on the part of the Court to rewrite the will and make such distribution of the property as it deemed proper at the time of the hearing rather than to give the language used in the will the meaning the Courts have ruled such language to have.

WHEREFORE, your Petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States

Court of Appeals for the District of Columbia, commanding that the Court to certify and send to this Court for its review and determination, on a day certain be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 8874, *Timothy Costello, et al., appellants,* v. *Timothy J. Costello, et al., appellees,* and that the said judgment of the United States Court of Appeals for the District of Columbia may be reversed by this Honorable Court, and that your Petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your Petitioners will ever pray.

TIMOTHY F. COSTELLO,
KATHERINE A. COSTELLO.

FRED J. RICE,
WILLIAM E. LEAHY,
Counsel for Petitioners.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The opinion of the United States Court of Appeals, the findings of fact, conclusions of law, memorandum and judgment of the District Court are printed on Pages 15 to 18, 20 and 21, of the Transcript of Record.

II

Statement of the Case

We adopt by reference Paragraphs A and C of our foregoing petition. The opinion of the Court of Appeals recognizes "the general rule of construction that a devise to

'heirs at law' of a testator will ordinarily be construed as referring to those who are such at the time of the testator's death, since the law favors the early vesting of estates," unless "a different intention is clearly manifested in the will." The question at issue is, therefore, whether an intent that the remainder devised under Item 5 of the will (R. 2) should not vest at the testatrix's death is clearly manifested in her will.

III

Specification of Errors and Summary of the Argument

(Presented as Points)

Point One

The United States Court of Appeals for the District of Columbia erred in finding that Item 5 of the will of Katherine Connor "after the death of my brother Jeremiah Costello, I give and devise the real estate devised to him, for life, in the second item hereof, to such persons as may at the time of the death of my said brother be my heirs at law," as meaning testatrix's heirs at law determined at the death of the life tenant.

A

For the purpose of clarity the following is Item 5, the item in dispute, in the Costello will, briefed. (R. 2)

> "After the death of my brother * * *, I give and devise the real estate devised to him, for life, * * * to such persons as may at the time of the death of my said brother be my heirs at law * * *."

In the following cases the Court ruled that the property vested at the death of the testator:

> *Dove* v. *Torr,* 128 Mass. 39, after setting up a life estate the will provided: "After the marriage or death

of my surviving daughter taking under this item, the estate herein devised shall descend to those persons who may then be entitled to take the same as my heirs." The Court said: "The word 'then' is here inserted, * * * by way of defining the time when they shall come into the enjoyment of that which is devised to them."

Johnson v. *Washington Loan & Trust Company,* 33 App. D. C. 242-259, the Court stated at Page 256: "Adverbs of time, as 'where,' 'there,' 'from,' etc., in a devise of a remainder, are construed to relate merely to the time of the enjoyment of the estate and not the time of vesting in interest."

Vogt v. *Vogt,* 26 App. D. C. 46-54, the Court said: "It is a rule of law that estates shall be held to vest at the earliest possible period, unless there be a clear manifestation of the intention of the testator to the contrary."

Thomas v. *Thomas,* 247 Illinois 543, the will in question read as follows: "I give and devise to my daughter (description of the real estate), to have and to hold for life, and at her decease, the same to be divided among her children in fee, share and share alike." The Court said: "* * * in the absence of a clear intention to the contrary, a remainder to a class vests in those members of the class in esse, at the testator's death, where postponement is by no apparent reason, except to let in a life estate." Following Carter v. Carter, 234 Illinois 507.

Farnam v. *Farnam,* 53 Conn. 261, in the said Farnam case the estate was left to the wife for life, "Then at her death, I give and devise all the estate which shall then be held in trust, under this will, to my grandchildren, who shall then be living." The Court said: "* * * I give, devise and bequeath (similar to Connor will), imports a present interest, unless other provisions in the will clearly manifest a different intention."

In *McArthur et al.* v. *Scott et al.,* 113 U. S. Rep. 380, the Court said: "The word 'inherited' (which is ap-

plied to the real estate only) implies taking immediately from the testator upon his death, as heirs take immediately from their ancestor, upon his death. Devises or bequests in remainder, by the use of similar words, though preceded, as in this case, by the word 'then' have often held to be vested from the death of the testator." (Cases omitted.) "Words directing land to be conveyed to or divided among remaindermen after the termination of a particular estate are always presumed, unless clearly controlled by other provisions of the will, to relate to the beginning of enjoyment by the remaindermen, and not to the vesting of the title in them. For instance, under a devise of an estate, legal or equitable, to the testator's children for life, and to be divided upon or after their death among his grandchildren in fee, the grandchildren living at the death of the testator take a vested remainder at once, subject to open and let in afterborn grandchildren."

Barker v. *Monks, supra,* after setting up a life estate the testator directed that: "Until the decease of all my children. I then order and direct that my Trustee for time being shall make over and convey all my estate equally to my grandchildren." "The word 'then' (and similar expressions) when used in present connection is held to mean when estate was to be distributed and not used by way of description of persons who were to take."

Marsh v. *Hoyt, supra,* after setting up a life estate the testator directed that: "To my niece, Anna A. Nye, for life, and, to take effect at her decease, said one-third part to her children in equal shares, to them, their heirs forever."

Brown v. *Brown, supra,* after setting up a life estate the testafor directed that: "Upon death of my wife, then it is my will that my estate then remaining be divided between my lawful heirs."

Kenyon, Petitioner, supra, after setting up a life estate the testator directed that: "After the decease

of D. C. Kenyon, I give and bequeath, all the property affected by the above trust (life estate) which shall then remain, to my own right heirs." The Court quoted Cusack v. Rood, 24 W. R. 391, in which testator left a life estate and then stated: "After their death to pay, distribute and divide the same between and among the persons who, under the statute for distribution of intestate estates, would then be entitled thereto."

Mortimer v. *Mortimer, supra,* after setting up a life estate the testator directed that: "*After death* of my child *to such persons as will then be* entitled to receive as my next of kin." (Emphasis added.)

Bullock v. *Downes, supra,* after setting up a life estate the testator directed that: "After death of child without issue to such persons of blood of me as would by virtue of Statute of Distribution have become and had been then entitled thereto," Court said that "then" refers to possession.

Williams et al., Trustees v. *Taylor,* 276 Mass. Rep. 357;
Blume v. *Kimball,* 222 Mass. Rep. 412;
Suman v. *Harvey,* 114 Md. Rep. 241;
Lee v. *Waltjen,* 141 Md. Rep. 460;
Grace v. *Thompson,* 169 Md. Rep. 659;
Larmour v. *Rich et al.,* 71 Md. Rep. 374;
Hoover et al. v. *Smith et al.,* 96 Md. Rep. 393;
Clark v. *Shawen,* 190 Illinois 47;
Linton v. *Laycock et al.,* 3 Ohio State Rep. 134;
68 Cal. App. 420.

B

Nicodemus National Bank v. *Snyder,* 178 Md. Rep. 147, the Court said: "In discussing the rule where a devise in remainder is to the heirs of the testator or to his next of kin, it is said in 24 Am. & Eng. Encyc. of Law (2 Ed.) 394, 'the fact that the devisee of this particular estate is one of several persons who, at the death of the testator, answers the description of heirs or next of kin, does not prevent the application of the

rule. He would take jointly with the others a vested remainder.' "

Abbott v. *Bradstreet, et al,* 3 Allen (Mass.) Rep. 589;
Henkin v. *Henkin,* 287 Illinois 62;
Himmel v. *Himmel,* 294 Illinois Rep. 557;
139 Illinois 433;
266 Illinois 414;
251 Illinois 568.

C

Thompson et al., Trustees v. *Clarke et al.,* 264 Mass. Rep. 56, the Court said: "The testator must have contemplated that the events upon which the estate might go to heirs under different clauses in his will would occur at different times. It is hardly probable that he could have intended three different groups when he made gifts to his heirs at law in three different clauses of his will."

POINT TWO

That the United States Court of Appeals of the District of Columbia failed to consider that in drawing the will for the testatrix, Mr. Alexander H. Bell, used the wording construed by this and Courts of competent jurisdiction, as meaning that the heirs at law of the testatrix to whom the remainder was devised were to be determined as of the death of the testatrix.

Apgar v. *Hoffman,* 113 N. J. Eq. 233.

In the real estate referred to in Item 4 of the will, the testatrix's nephew had a life estate and the testatrix a vested remainder. In that item she transfers that vested remainder. It can hardly be imagined that it was her intention that title to that remainder was not to vest until the death of the nephew. In that event, who could convey the property in the interim? No trust is set up. Yet the

words used in Items 4 and 5 are the same. The United States Court of Appeals failed to consider this point.

Point Three

That the United States Court of Appeals of the District of Columbia failed to consider the law of the District of Columbia that no right in inheritance could vest in the brother and nephews and nieces of the testatrix unless such persons were in being and capable in law to take heirs at the time of the death of the testatrix.

Section 103 of Title 18 of the Code of Laws of the District of Columbia which provides:

> "No right in the inheritance shall accrue to or vest in any person other than the children of the intestate and their descendants, unless such person is in being and capable in law to take as heirs at the time of the intestate's death * * *," having been embodied in Item 5 of the will by the use of the words "heirs at law" indicates the intention of the testatrix that the remainder was to vest upon her death.

Conclusion

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of supervisory powers, in order that the law as decided by this Court, the Courts of the District of Columbia, and other Courts of the United States of competent jurisdiction may be uniformly administered, and that the decision of this Court and competent jurisdiction may remain effective and that to such an end the Writ of Certiorari should be granted and this Court should review the decision of the United States Court of Appeals of the District of Columbia.

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(9155)

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No. 211.

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AUG 24 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1945.

TIMOTHY F. COSTELLO *et al.*, *Petitioners*,

v.

TIMOTHY J. COSTELLO *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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IN THE

Supreme Court of the United States

October Term, 1945.

No. 211.

TIMOTHY F. COSTELLO *et al., Petitioners,*

v.

TIMOTHY J. COSTELLO *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

Opinions Below.

The opinion of the District Court (R. 20-21) is not yet reported. The opinion of the United States Court of Appeals for the District of Columbia (R. 23-25) is not yet reported.

Jurisdiction.

The judgment of the United States Court of Appeals for the District of Columbia sought to be reviewed was entered on April 9, 1945 (R. 26). The petition for a writ of certiorari was filed July 10, 1945. The jurisdiction of this

Court is invoked under Section 1 of the Act of February 13, 1925, 28 U. S. C. sec. 347.

Question Presented.

Whether the heirs of a testatrix, within the meaning of her will, are to be determined as of the date of her death or as of the date of the death of the life tenant.

Statement.

This is a suit for the partition and sale of certain real estate in the District of Columbia. There is no dispute as to the facts. On June 6, 1936, Katherine Connor executed her last will. By Item 2 of the will she devised to her brother, Jeremiah Costello, during his natural life, certain real estate situated in the District of Columbia. Item 5 of the same will provides:

> Item 5. *After the death of my brother* Jeremiah Costello, I give and devise the real estate devised to him, for life, in the second item hereof, to *such persons as may at the time of the death of my said brother be my heirs at law*, in fee simple and absolutely. (Italics supplied.)

On October 12, 1941, the testatrix died possessed of the property mentioned in Item 2 of the will, and the life tenant, Jeremiah Costello, entered into possession. (Fdg. 3, R. 16). The life tenant died on November 8, 1942. (Fdg. 3, R. 16). At the time of his death there were ten nieces and nephews of the testatrix, the children of her four deceased brothers. (Fdg. 4, R. 16). They are: The appellees, Timothy J., James R., Ella A. and Robert F. Costello (children of Robert F. Costello); Leo A. Costello, Helen Saied, Mary Birch and Elizabeth Nolan (children of

Timothy C. Costello); the appellant Timothy F. Costello (son of Thomas A. Costello) and Timothy A. Costello[1] (son of Jeremiah Costello).

On April 28, 1943, the four children of Robert F. Costello, deceased brother of the testatrix, filed an amended complaint seeking partition by sale of the property here involved (R. 307), and pursuant to court order all the parcels have been sold. (Fdg. 1, R. 15.) They then filed a motion for summary judgment seeking an *equal* distribution of the proceeds among the ten nephews and nieces. (R. 11-12.) The four children of Timothy C. Costello joined in the motion for summary judgment. (R. 12-13.) However, the appellant Timothy F. Costello and Timothy A. Costello filed an answer contending that the heirs of the testatrix are to be determined as of the date of her death and consequently that they, claiming through their respective fathers, Thomas A. and Jeremiah Costello, deceased brothers of the testatrix, take *per stirpes*[2] and hence each is entitled to one-fourth rather than one-tenth of the proceeds arising from the sale of the property. (R. 13-15.)

On August 11, 1944, the District Court wrote an opinion holding that the terms of the will clearly stated that the heirs of the testatrix were to be determined at the time of the life tenant's death, and since the heirs at that time were nephews and nieces of the testatrix, in the same degree of relationship, they were entitled to share the proceeds *per*

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[1]Katherine Costello, the mother of Timothy A. Costello, having acquired his interest in the property involved, was substituted as a party defendant in the Court below, and is now an appellant. (Fdg. 5, R. 16.)

[2]The respondents concede, of course, that if the testatrix intended that her heirs should be determined at the time of her death (rather than at the date of the death of the life tenant, as is so clearly expressed in the will), the appellants would take per stirpes and would each be entitled to one-fourth of the proceeds of the sale of the property.

capita in accordance with Section 18-105, D. C. Code (1940). Accordingly, findings of fact and conclusions of law were filed and judgment thereon entered. (R. 17-18.)

Upon appeal, the United States Court of Appeals for the District of Columbia affirmed the judgment.

Argument.

1. The question which petitioners seek to have this Court review is whether under the terms of the will the heirs of the testatrix should have been determined as of the date of the death of the life-tenant. Contrary to petitioners' contention, the will plainly provides that the heirs of the testatrix are to be determined at the time of the life tenant's death. The will states (Item 5):

> Item 5. *After the death of my brother* Jeremiah Costello, I give and devise the real estate devised to him, for life, in the second item hereof, *to such persons as may at the time of the death of my said brother be my heirs at law*, in fee simple and absolutely. (Italics supplied.)

As the Court of Appeals pointed out (R. 24):

> The District Court found that testatrix intended that the heirs should be determined as of the date of the death of her brother and accordingly held under the applicable District of Columbia statute that the proceeds of the property, which had been sold by a previous order of court, were distributable in equal shares to the ten nephews and nieces. In reaching this conclusion the District Judge recognized the general rule of construction to be that a devise to "heirs at law" of a testator will ordinarily be construed as referring to those who are such at the time of the testator's death, since the law favors the early vesting of estates. But the court likewise recognized that where a different intent is clearly manifested in the will, such manifest intention will govern. Accordingly,

the District Judge found that the language of the will clearly showed the purpose of testatrix in creating the life estate in her brother was to have the will speak as to the remainder as of the death of the brother. We are in accord with that view.

The language of the will plainly shows that the heirs of the testatrix are to be determined at the life tenant's death. Not only in explicit language does the testatrix refer to "such persons as may at the time of the death of my said brother be my heirs at law", but she uses language which explicitly puts off the gift until "after the death of my brother Jeremiah Costello". "Estates shall be held to vest at the earliest possible moment, *unless there be a clear manifestation of the testator to the contrary*". (Italics supplied.) *O'Brien v. Dougherty* 1 App. D. C. 165. *Craig v. McFadden* (Tex. Civ. App.) 191 S. W. 203, writ of error denied, Supreme Court of Texas, 196 S. W. XIV; *Carr v. New England Anti Vivisection Society,* 234 Mass. 217, 125 N. E. 159; *Peck v. Carlton,* 154 Mass. 231; *Union & New Haven Trust Co. v. Ackerman,* 114 Conn. 152; *cf. Greenwood v. Page,* (78 App. D. C. 166; 138 F. 2d 921). See Note, A. L. R. 174 186 *et seq.* "If a will provides specifically that the testator's heirs are to be determined as of a certain time, effect will be given to such provision * * *." 3 Page on Wills (3rd ed. 1941) sec. 1054, pp. 229-230.

Petitioners' contention (Pet. 6) that the decision of the United States Court of Appeals for the District of Columbia is in conflict with appellate courts of other jurisdictions is without substance. The cases relied upon by petitioners disclose that the wills there involved do not indicate an intent as in this case that the heirs should be determined at a date other than that of the decedent's death. Indeed, they recognize the well settled doctrine

that where the language of the testator clearly fixes the time at which the heirs are to be determined, that intent must govern.

2. The only controversy in this case is whether Item 5 of the will provided that the testatrix's heirs should be determined as of her death or as of the life tenant's death. It is a question of determining the decedent's intent according to well established rules of testatmentary construction about which there is no conflict in any court. No question of public importance is involved, nor is the issue of any great moment except as among the particular litigants, and the effect of the decision of the Court of Appeals is limited to the parties. Consequently, there is no substance to petitioners' contention that the decision of the Court of Appeals will be of "great moment" in so far as titles in the District of Columbia are concerned, and accordingly this case is not a proper one for this Court to review.

Conclusion.

The decision of the Court below is correct, and no question of importance or conflict of decisions is presented. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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